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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

GENERAL ELECTRIC COMPANY, ET AL.,
Petitioners,

v.

ATLANTIC CITY ELECTRIC COMPANY, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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C. H. Wheeler Manufacturing Company, The Clark Controller Company, Hubbard and Company, Lapp Insulator Company, Inc., McGraw-Edison Company and Ohio Brass Company

PORTER R. CHANDLER,
Carrier Corporation

JACOB IMBERMAN,
Cornell-Dubilier Electric Corporation and Federal Pacific Electric Company

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Cutler-Hammer, Inc.

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Foster Wheeler Corporation

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ERNEST S. MEYERS,
Schwager-Wood Corporation

WILLIAM C. BLIND,
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ALLAN D. EMIL,
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March 8, 1963

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

GENERAL ELECTRIC COMPANY, *et al.*,
Petitioners,

v.

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners* pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in these actions on December 31, 1962.

*The petitioners are the following 29 manufacturers of electrical and industrial equipment: A. B. Chance Company, Allen-Bradley Company, Allis-Chalmers Manufacturing Company, Carrier Corporation, C. H. Wheeler Manufacturing Company, The Clark Controller Company, Cornell-Dubilier Electric Corporation, Cutler-Hammer, Inc., Federal Pacific Electric Company, Foster Wheeler Corporation, General Electric Company, H. K. Porter Company, Inc., Hubbard and Company, Ingersoll-Rand Company, I-T-E Circuit Breaker Company, Joslyn Mfg. & Supply Co., Kuhlman Electric Company, Lapp Insulator Company, Inc., McGraw-Edison Company, Moloney Electric Company, Ohio Brass Company, The Porcelain Insulator Corporation, Sangamo Electric Company, Schwager-Wood Corporation, Southern States, Inc., Square D Company, Wagner Electric Corporation, Westinghouse Electric Corporation and Worthington Corporation.

Opinions Below

The opinion of the District Court for the Southern District of New York is reported at 207 F. Supp. 613 and is annexed hereto as Appendix A. The opinion of the court of appeals affirming, with one dissent, the decision of the district court is reported at CCH TRADE REG. REP. (1963 Trade Cas.) ¶ 70,604, and is annexed hereto as Appendix B.

Jurisdiction

The judgment of the court of appeals was entered on December 31, 1962. R. III, 165.* The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

Question Presented

Whether the running of the statute of limitations provided by Congress in Section 4B of the Clayton Act with respect to an action for damages brought under Section 4 of the Clayton Act may be tolled by fraudulent concealment of the cause of action.

Statutes Involved

Clayton Act of 1914, Section 4, 15 U. S. C. § 15, 38 Stat. 731. Suits by persons injured; amount of recovery.

> "That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent,

*"R." references are to the record and proceedings in the United States Court of Appeals for the Second Circuit.

without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Clayton Act, Section 4B, 15 U. S. C. § 15b, 69 Stat. 283 (1955). Limitation of actions.

"Any action to enforce any cause of action under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act."

Clayton Act, Section 5(b), 15 U. S. C. § 16(b), 69 Stat. 283 (1955). Suspension of limitations.

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

Statement

This petition seeks review of a judgment of the court of appeals (annexed hereto as Appendix C) affirming an order of the district court entered on August 1, 1962, (annexed

hereto as Appendix D) with respect to the applicable period of limitation in 427 treble damage actions pending in the United States District Court for the Southern District of New York.* The complaints in all of those actions claim treble damages under Section 4 of the Clayton Act, 15 U. S. C. § 15, resulting from alleged conspiracies in violation of Section 1 of the Sherman Act, 15 U. S. C. § 1, 26 Stat. 209 (1890). Each complaint alleges one or more causes of action for damages based on purchases of various kinds of electrical equipment during a period beginning, in some cases, at least as early as 1945. In order to support plaintiffs' claims in respect of periods of time outside the statutory period of limitation provided in Sections 4B and 5(b) of the Clayton Act, most of the 427 complaints further allege that the defendants named therein fraudulently concealed from plaintiffs the existence of the alleged conspiracies.

Sections 4B and 5(b) of the Clayton Act were enacted in 1955 and became effective on January 7, 1956. They provide that any cause of action under Section 4 of the Clayton Act shall be forever barred unless commenced within four years after the cause of action accrued or, if related criminal or injunction proceedings are commenced by the United States within the four-year period, during the pendency of such enforcement proceedings and one year thereafter. The complaints herein were filed at various times between November 1961 and August 1962. Government criminal and injunction proceedings, on which it is alleged the complaints herein are based in whole or in part,

*District Judge Feinberg's order of August 1, 1962, was entered on that date in 418 actions. By pre-trial order entered on September 14, 1962, Judge Feinberg's order was entered in nine additional actions which had been commenced after August 1, 1962. Record on Appeal, p. 100. By stipulation entered on November 7, 1962, the 427 actions were consolidated for purposes of appeal. R. III, 145.

were instituted in the United States District Court for the Eastern District of Pennsylvania at various times after February 1, 1960, and such criminal or injunction proceedings were either pending at the time the complaints herein were filed or had been terminated not more than one year prior thereto.* The period of time beginning four years prior to the commencement of the relevant government proceedings, if any, is, therefore, herein referred to as the statutory period of limitation.

The order affirmed by the court of appeals denied the motion of defendants (the petitioners here) to strike under Rule 12(f) of the Federal Rules of Civil Procedure (1) all allegations relating to damages claimed for any period prior to the statutory period of limitation and (2) all allegations of fraudulent concealment of the alleged conspiracies. That motion to strike was made in accordance with a comprehensive plan of pre-trial procedure developed under the supervision of District Court Chief Judge Sylvester J. Ryan in conformity with a program approved by a subcommittee of the Judicial Conference Committee on Pre-Trial Procedure. That subcommittee had been directed by Mr. Chief Justice Warren to consider the handling of the more than 1,800 treble damage actions which have been commenced against manufacturers of electrical equipment in 33 federal judicial districts.** The motion was designed to permit a determination as to the applicable period of limitation at the outset of protracted litigation of unprecedented volume, scope and complexity in an effort to minimize the likelihood that existing judicial machinery would be overwhelmed by discovery proceedings and trials with respect to claims that would ultimately be held to be barred by the statute of limitations. Similar motions have been made in many of the other dis-

*Not all the defendants named herein were named as defendants in the relevant government enforcement proceedings.

**See N. Y. Times, February 7, 1962, p. 1, col. 7.

trict courts in which electrical equipment treble damage actions are pending and the decisions on those motions are now in various stages of appellate review.*

Petitioners contended in the district court and the court of appeals that the limitation provisions of Sections 4B and 5(b) bar all claims herein which did not accrue within the statutory period of limitation and that the allegations of fraudulent concealment are immaterial.

The Decision Below

The motion in the district court raised a question of law and no issue of fact. The district judge found that the prior opinion of the Second Circuit Court of Appeals in *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F.2d 80 (2d Cir.), *cert. denied*, 368 U. S. 821 (1961), obliged him to hold that fraudulent concealment tolls the running of the 4-year period of limitations specified in Section 4B of the Clayton Act. App. 5a. The district court found further that its decision involved "a controlling question of law as to which

*A petition for certiorari (No. 881) was filed in this Court on February 28, 1963, seeking review of the decision of the Court of Appeals for the Eighth Circuit in *Kansas City* v. *Federal Pac. Elec. Co.*, 310 F. 2d 271 (8th Cir. 1962). Argument was heard in the Tenth Circuit on January 11, 1963, *Public Serv. Co.* v. *General Elec. Co.*, No. 7140, and in the Seventh Circuit on February 11, 1963, *Allis-Chalmers Mfg. Co.* v. *Commonwealth Edison Co.*, No. 13903. The Court of Appeals for the Ninth Circuit has granted an application for leave to appeal under 28 U. S. C. § 1292(b) from a decision of the District Court for the Southern District of California in *Department of Water & Power* v. *Allis-Chalmers Mfg. Co.*, CCH TRADE REG. REP. (1963 Trade Cas.) ¶ 70651 (S. D. Cal. 1963). Likewise, the Court of Appeals for the Fifth Circuit has granted an interlocutory appeal from an order of the District Court for the Western District of Texas in *City of San Antonio* v. *General Elec. Co.*, Civ. No. 3063, entered on December 7, 1962. A motion raising the statute of limitations question was decided and certified for interlocutory appeal by the District Court for the District of Columbia on March 5, 1963. *City of Burlington* v. *Westinghouse Elec. Corp.*, Civ. No. 348-62. A similar motion was filed on January 14, 1963, in *City of Lubbock* v. *Westinghouse Elec. Corp.*, No. 2777, in the District Court for the Northern District of Texas.

there is a substantial ground for difference of opinion, and that immediate appeal from the order may materially advance the ultimate termination of the litigation." App. 12a. Pursuant to that determination, the Court of Appeals for the Second Circuit granted petitioners' application for leave to appeal under 28 U. S. C. § 1292(b). R. 141. On its own motion, the court of appeals ordered argument before the court sitting en banc "because of the importance of the question." App. 7b.

The court of appeals stated that its prior decision in *Moviecolor Ltd.* v. *Eastman Kodak Co., supra*, was "not dispositive of the question now before us." App. 6b. It nevertheless affirmed the decision of the district court, relying upon the statement by this Court in *Holmberg* v. *Armbrecht*, 327 U. S. 392, 397 (1946), to the effect that the tolling doctrine of *Bailey* v. *Glover*, 21 Wall. 342 (1874), "is read into every Federal statute of limitation." The court below held:

> "As we read the Supreme Court's opinion in *Holmberg* v. *Armbrecht, supra*, that policy is so strong that it is applicable unless Congress expressly provides to the contrary in clear and unambiguous language." App. 10b.

Accordingly, the court concluded that congressional rejection of a number of bills, preceding the enactment of Section 4B of the Clayton Act in 1955, which expressly provided that in conspiracy cases the statute of limitations would not begin to run until the claimant discovered or had reason to discover the facts on which his claim was based* did not constitute "the kind of express negative which we think would be necessary to reverse so well established a policy of the law." App. 10b. From that decision Circuit Judge Leonard

*A synopsis of the legislative history of Sections 4B and 5(b) is annexed hereto as Appendix E.

P. Moore dissented, observing that by reading the tolling provision into Section 4B the majority "enact, in effect, a statute deliberately rejected by Senate and House." App. 18b.

Reasons for Granting the Writ

The decision below involves an important question of federal law which has not been, but should be, settled by this Court because of its widely recognized impact on the administration of the federal courts and on the more than 1,800 electric equipment damage actions now pending in those courts and because it is predicated on a serious misinterpretation of *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946).

I.

The decision below involves the interpretation of a recent legislative addition to the federal antitrust laws not heretofore examined by this Court. After four decades of reliance on multifarious state statutes of limitation, Section 4B was adopted by Congress in 1955 in response to the demonstrated need for establishing a definitive and uniform federal period of limitation for the ever increasing volume of complex litigation for damages under the antitrust laws. See H. R. REP. No. 422, 84th Cong., 1st Sess. (1955); S. REP. No. 619, 84th Cong., 1st Sess. (1955); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 380-83 (1955).

The importance of the decision below is apparent from the novel view it takes of the relationship of the judiciary to the legislature and from its practical impact on the administration of justice. Since, as this Court observed in *Grunewald* v. *United States*, 353 U. S. 391, 402 (1957), "every conspiracy is by its very nature secret", the opportunity exists in every such case to allege fraudulent concealment

and, therefore, the effect of the decision below is to emasculate the statute of limitations provided by Congress with respect to a federally-created cause of action. Where Congress wrote in 1955 that "*any cause of action* under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued" subject only to the limited extension provided where a government criminal or injunction proceeding has been commenced, the decision below has held that causes of action alleging conspiracy shall in effect be exempted. And this anomalous result was reached in spite of the fact that Congress repeatedly rejected bills providing for tolling until discovery in conspiracy cases, witnesses having testified that such a tolling effectively removed the limitation and was administratively undesirable. *Hearings on S. 1910 before a Subcommittee of the Senate Committee on the Judiciary*, 81st Cong., 1st Sess. (1949); *Hearings before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong., 2d Sess., ser. 14, pt. 5 (1950).

The effect of the decision below is to impose on courts and litigants burdens which Congress sought to avoid. When it is noted that considerably more than 200 private antitrust actions are commenced in the federal courts each year,* many of which are difficult and protracted cases, the importance of the decision for the administration of the federal judicial system is manifest. The effect of the decision below on the 427 electrical equipment cases pending in the Southern District of New York is to bring within the ambit of litigation tens of thousands of additional transactions and sales aggregating hundreds of millions of dollars. When the more than 1,800 electrical equipment treble damage actions

*Annual figures for the years 1957-1961 are given in ANN. REP., DIR. ADMIN. OFFICE OF THE U. S. COURTS 163 (1961). The number of actions commenced in 1961 was 378.

pending throughout the country are taken into account the administrative impact of the decision is staggering. Each additional year as to which claims may be asserted brings into question sales of electrical equipment averaging more than one billion dollars and involving hundreds of thousands of separate transactions. Some few of the complaints make claims with respect to transactions over a period of 30 years; many, if not most, of the complaints assert claims antedating the statutory period of limitation by as much as a decade. Even if confined to the statutory period of limitation these actions are of monumental proportions. If the statutory barrier to stale claims is removed, we submit that the capacity of the judiciary, of counsel and of the parties to litigate those claims in any rational and fair way will be exceeded. The need for adequate pre-trial discovery alone will swallow the energies and resources of all concerned. A decision which imposes burdens of these dimensions on the federal judiciary and on vital national industries calls for review by this Court at this time.

The fundamental importance of the decision of which review is here sought has been widely recognized. Evidence of that recognition may be seen in the determination of the district court below that it involves "a controlling question of law as to which there is a substantial ground for difference of opinion, and that immediate appeal from the order may materially advance the ultimate termination of the litigation." App. 12a. Eight other district courts before which electrical equipment treble damage actions are pending have made a similar determination.* Likewise the court of appeals

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City of San Antonio v. *General Elec. Co.*, Civ. No. 3063, W. D. Tex., December 7, 1962; *Department of Water & Power* v. *Allis-Chalmers Mfg. Co.*, CCH TRADE REG. REP. (1963 Trade Cas.) ¶ 70651 (S. D. Cal. 1963); *Brigham City Corp.* v. *General Elec. Co.*, 210 F. Supp. 574 (D. Utah 1962); *Public Serv. Co.* v. *Allen-Bradley Co.*, CCH TRADE REG. REP. (1962 Trade Cas.) ¶ 70549 (D. Colo.

below was led by its recognition of "the importance of the question" to order argument before the Court sitting en banc. App. 7b. It has been stated that it is the view of the Co-ordinating Committee for Multiple Litigation of the United States Courts, which has been charged with the responsibility of co-ordinating the electrical equipment cases, that the statute of limitations question is "probably the most important question we now have before us" and that the prevailing parties in the Second Circuit, respondents here, should join with the petitioners in seeking speedy review in this Court.*

A definitive determination of the applicable period of limitation is of vital importance to the functioning of the electrical equipment National Discovery Program itself designed by the judges' Co-ordinating Committee to ease the burden imposed by this mass of litigation. Under that program documents are produced for inspection at a central national depository available to litigants in all of the 33 districts in which electrical equipment cases are pending; and depositions are held with the participation of all interested parties and are deemed to have been taken in each of the more than 1,800 actions. Plainly such a program cannot function effectively without a uniform ruling on the applicable period of limitation. Yet two of the district courts which have ruled on the question have held that the statutory period announced by Congress is not to be qualified by any

1962); *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 210 F. Supp. 557 (N. D. Ill. 1962); *United States* v. *General Elec. Co.*, 209 F. Supp. 197 (E. D. Pa. 1962); *Public Serv. Co.* v. *A. B. Chance Co.*, CCH TRADE REG. REP. (1962 Trade Cas.) ¶ 70551 (D. N. M. 1962) *City of Burlington* v. *Westinghouse Elec. Corp.*, Civ. No. 348-62, D. D. C., March 5, 1963. In only one of those cases has leave to appeal under § 1292(b) been denied by a court of appeals. *United States* v. *General Elec. Co.*, Order of September 21, 1962 (3d Cir.).

*Statement of District Judge Edwin A. Robsoff at a meeting in San Antonio on February 7, 1963, attended by 23 judges and some 70 lawyers concerned with the electrical equipment cases. Transcript, pp. 5-8.

supposed judicial doctrine of fraudulent concealment, and those decisions have not been reversed by courts of appeals.* Moreover, the decision of the Second Circuit is inconsistent with the decision of the Fifth Circuit in *United States* v. *Borin*, 209 F. 2d 145 (5th Cir.), *cert. denied*, 348 U. S. 821 (1954), where the court of appeals found the doctrine of *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946), inapplicable to the False Claims Act, 31 U. S. C. §§ 231-233, Rev. Stat. 3490-92 (1875). The court there wrote:

> ". . . The section is explicit in commanding that every such suit be commenced within six years from the commission of the act, *and not afterward*. This emphatic language must have been employed with full recognition of the fact that in most cases the falsity of the claim would remain concealed for a long time. The intention seems clear that the time would not be extended on account of any fraud or concealment." 209 F. 2d at 147-148.**

II.

The decision below is grounded on a serious misinterpretation of the decision of this Court in *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946).

The court below, first, was under the misapprehension that, after *Holmberg* v. *Armbrecht* and its predecessors, *Bailey* v. *Glover*, 21 Wall. 342 (1874); *Exploration Co.* v. *United States*, 247 U. S. 435 (1918), it was well known and should have been clear to Congress that a statute of limita-

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Public Serv. Co. v. *A. B. Chance Co.*, CCH TRADE REG. REP. (1962 Trade Cas.) ¶ 70551 (D. N. M. 1962); *Brigham City Corp.* v. *General Elec. Corp.*, 210 F. Supp. 574 (D. Utah 1962). See also *Rinzler* v. *Westinghouse Elec. Corp.*, C. A. No. 7427, N. D. Ga., October 30, 1962. (Not reported; reprinted at R. II, 131a.)

**In *Rinzler* v. *Westinghouse Elec. Corp.*, Civil Action No. 7427, N. D. Ga., October 30, 1962, *Borin* was held to control the application of Section 4B of the Clayton Act in a treble damage action and to preclude tolling for concealment. R. II, 131a. But see *City of San Antonio* v. *General Elec. Co.*, Civ. No. 3063, W. D. Tex., December 7, 1962 (no opinion).

tion applicable to a non-fraud cause of action at law would be tolled by reason of fraudulent concealment. That proposition was so far from being well known to Congress that from 1949 to 1955 a voluminous legislative history was generated on the very question of whether to provide for tolling until discovery in conspiracy cases. Never in the course of that history was *Holmberg* mentioned nor was it suggested that any tolling would be supplied in the absence of legislative provision. The failure of the numerous attorneys who variously urged or opposed the legislative adoption of a tolling provision to note that tolling would be read in by the courts in any event is explainable only by the fact that the proposition assumed by the court below is erroneous.

Holmberg was an action in equity and the doctrine there applied was traditionally limited to equity. It was only in 1961 that it was held for the first time that "the principle of Holmberg v. Armbrecht applies also in an action 'at law' to enforce a federal right." *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F. 2d 80, 84 (2d Cir.), *cert. denied*, 368 U. S. 821 (1961). Circuit Judge Friendly writing for the court in *Moviecolor* observed that "neither the parties' research, nor our own, has disclosed any decision truly determinative of that issue either by the Supreme Court or by a Court of Appeals . . ." *Id.* Furthermore, the equitable tolling doctrine has traditionally been applied only in suits the gravamen of which was fraud; indeed, it was a doctrine of concealed fraud rather than of fraudulent concealment. The opinion of this Court in *Holmberg*, written by Mr. Justice Frankfurter, referred precisely to "the settled federal equitable doctrine as to fraud". 327 U. S. at 397. A claim for treble damages under Section 4 of the Clayton Act is clearly not an action the gravamen of which is fraud and was, therefore, outside the ambit of the *Holmberg* case at the time when congressional committees were debating the desirability of a tolling provision.

Accordingly, the court below was in error in finding that *Holmberg* was applicable, and was known by Congress to be applicable, to such a claim prior to the enactment of Sections 4B and 5(b) in 1955. That error is underscored by the fact that congressional committees considered at length precisely the question of whether the judicial rule in fraud cases should be legislatively extended to causes of action under Section 4 of the Clayton Act alleging conspiracy. See, *e.g., Hearings on S. 1910 before a Subcommittee of the Senate Committee on the Judiciary,* 81st Cong., 1st Sess., pt. 2 at 56, 66 (1949). Professor Milton Handler, among others, in opposing such extension of the judicial fraud rule, advised Congress that:

> ". . . In the fraud field experience has indicated that the discovery provision does not operate very smoothly or happily. It injects this element of uncertainty, when the fraud has been discovered." *Hearings before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary,* 81st Cong., 2d Sess., ser. 14, pt. 5, at 21 (1950).

Conversely, Mr. Thurman Arnold urged that such extension was necessary for the protection of treble damage plaintiffs. *Hearings on S. 1910 before a Subcommittee of the Senate Committee on the Judiciary,* 81st Cong., 1st Sess. at 4, 5 (1949). It is thus perfectly clear that Congress could not have known and did not assume that *Holmberg* would be applicable to the statute of limitations it was drafting.

Still more important, the decision below construes Justice Frankfurter's statement in *Holmberg* that "this equitable doctrine is read into every federal statute of limitation," 327 U. S. at 397, to mean that Congress can reject such a doctrine only with "words which cannot be misunderstood" amounting to an "express negative" which can be operative

only by expressly providing "to the contrary in clear and unambiguous language." App. 10b. This remarkable test, the court below found, was not met by the clear language of Section 4B providing that "any action to enforce any cause of action under sections 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued." Nor was that test met by the lengthy legislative history of Section 4B though it reflected prolonged consideration of the problem of the potential treble damage plaintiff from whom a cause of action has been concealed and the repeated rejection of bills providing for the tolling of the period of limitation until the cause of action was discovered.* See Appendix E.

In erecting this obstacle to effective legislation the court below has distorted the meaning of a phrase from *Holmberg* into something which this Court could not possibly have contemplated. Unless the doctrine of *Holmberg* is one of

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*The court below indicated (at note 9), and the Eighth Circuit expressly held, that the legislative history is not convincing because the rejection was of a concept entirely different from fraudulent concealment. This notion is plainly wrong; its only support is drawn from the contracted label "discovery", inartfully adopted by the proponents of the tolling provisions. It is clear that Congress was *not* dealing with simple discovery, *i.e.*, with cases in which non-discovery is not the result of conspiracy or other concealment on the part of the defendants but nevertheless the injured party is unaware of the violation. Had Congress directed its attention to such simple discovery, the limitation of the proposed tolling provisions to conspiracy cases, the requirement of due diligence, and all the discussions during the hearings regarding causes of action concealed are meaningless and irrational.

It is also arguable that the court below, in its treatment of the congressional rejection of discovery provisions, regarded the rejected provisions as provisions for tolling only in inherently self-concealing violations and therefore as not involving any congressional consideration of tolling in the case of violations as to which defendants have engaged in further, affirmative acts of concealment. But this analysis is equally fallacious. Congress considered the problem of concealment in conspiracy cases as a whole—without any attempt to distinguish between the self-concealing and the actively concealed—and rejected tolling as a method of dealing with that problem.

constitutional dimension—which plainly it is not—there is no conceivable ground for reading it into any federal statute in contravention of manifest congressional intent. The federal courts are without constitutional power to override the intent of Congress in enacting legislation, either upon the basis of a supposed principle of equity jurisprudence or on any other ground except that of unconstitutionality. Mr. Justice Frankfurter was, of course, not unaware of this limitation of judicial authority. He clearly pointed out that:

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive . . . The rub comes when Congress is silent." 327 U. S. at 395.

Holmberg was a case where Congress was silent. The Court was at pains to point out that:

> " . . . The implied absorption of State statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles." *Ibid.*

It was only "when Congress leaves to the federal courts the formulation of remedial details", that Justice Frankfurter concluded "it can hardly expect them to break with historic principles of equity in the enforcement of federally-created equitable rights." *Ibid.*

Quite apart from the fact that *Holmberg* involved equitable rights and the implied absorption of state statutes of limitation whereas the present cases involve legal rights and a definitive congressional statute of limitation, *Holmberg* involved a legislative situation altogether different from that presented here. Section 4B does not present a case in

which Congress left to the federal courts the formulation of remedial details. Section 4B is not a case where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles. Nor is the situation one in which congressional familiarity with a federal equitable remedial concept can suggest that Congress assumed that the statute it passed would be read against such a decisional background. Indeed, as has been pointed out above, throughout the hearings and debates which led up to the passage of Section 4B neither *Holmberg* nor its predecessors were ever referred to. The uniform assumption alike on the part of the proponents and the opponents of a tolling provision was that if Congress should enact none there would be none. It is thus apparent that in misplaced reliance on an ambiguous dictum of this Court the court below has adopted a position entailing serious implications for the relationship between the legislative and judicial branches of the federal government which makes review by this Court highly desirable.

The appropriateness of review is emphasized by the fact that the result reached below is contrary to the views expressed by this Court in *Soriano* v. *United States*, 352 U. S. 270 (1957). This Court there rejected the contention that the statute of limitations with respect to actions in the Court of Claims, 28 U. S. C. § 2501,* was tolled by the existence of hostilities. The Court there said:

*The pertinent part of 28 U. S. C. § 2501 (1954) reads:

"Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed, or the claim is referred by the Senate or House of Representatives, or by the head of an executive department within six years after such claim first accrues.

". . .

"A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases."

> "Strangely enough, Congress would be required to provide expressly in each statute that the period of limitation was not to be extended by war. But Congress was entitled to assume that the limitation period it prescribed meant just that period and no more." 352 U. S. at 275-76.

The Court thus made it clear that Congress cannot be expected or required to expressly negative every imaginable unintended exception to statutes of limitation but is, on the contrary, entitled to assume that its clear and unambiguous language will be enforced according to its terms. Yet it is precisely an "express negative" which the court below would require of Congress.

The Court in *Soriano* also pointed out that Congress had specifically provided for tolling by virtue of hostilities when it thought it appropriate to do so. Similarly, Congress has repeatedly demonstrated its ability to provide expressly for tolling in cases of a concealed cause of action.* Indeed, in 1949 and again in 1950, bills which were the predecessors of Section 4B were introduced which expressly provided that, in actions based upon alleged conspiracies, *i.e.*, those in which concealment might constitute a significant problem, the period of limitation would not begin to run until the plaintiff in the exercise of due diligence discovered the facts relied on for proof of the conspiracy. S. 1910, 81st Cong., 1st Sess. (1949); H. R. 7905, 81st Cong., 2d Sess. (1950).

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*Title 31 U. S. C. § 131, 60 Stat. 31 (1946), provides that the statute of limitation on actions by the United States to recover on account of forged endorsements does not begin to run against persons who "fraudulently concealed the cause of such action. . . ."

The Tariff Act of 1930, 19 U. S. C. § 1621, 46 Stat. 758 (1930), as amended, 49 Stat. 527 (1935), provides that actions to recover penalties or forfeitures may be instituted "within five years after the time when the alleged offense was discovered. . . ."

The Securities Act of 1933 provides specifically, for at least two of the actions created thereunder, a limitation period measured from the time of discovery of the cause of action. See 15 U. S. C. § 77(m), 48 Stat. 84 (1933). See also Securities Exchange Act, 15 U. S. C. §§ 78i(e), 78r(c), 48 Stat. 889, 897 (1934).

Both of those bills were, after thorough consideration, rejected.

Furthermore, Congress wrote into the statute of limitations which it adopted an express provision for tolling the period of limitation during the pendency of government enforcement proceedings and one year thereafter (Clayton Act, Section 5(b)), thus giving potential private plaintiffs the substantial advantage of being able to wait until the termination of government proceedings with the attendant exposure and marshalling of evidence (and, in some cases, the further benefit of judgments usable as prima facie evidence under Section 5(a) of the Clayton Act). That Congress intended the tolling provided by Section 5(b) to be the exclusive method of extending the four-year period provided by Section 4B is clear from the proviso to Section 5(b) which states:

> "... That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

It is apparent from the Report of the House Committee on the Judiciary which accompanied the bill finally enacted by Congress in 1955 that tolling of the statutory period of limitation for the pendency of government proceedings was an aspect of a compromise of the conflicting desires to safeguard the rights of plaintiffs and, at the same time, to prevent the undue impairment of business operations and the overburdening of court calendars with stale claims. H. R. REP. No. 422, 84th Cong., 1st Sess. (1955).* Simi-

*H. R. REP. 422 states, at page 8:

"III. TOLLING THE STATUTE OF LIMITATIONS

"This bill makes several important changes in the tolling provisions of existing law. As presently written, section 5 of

larly, the rejection of bills providing for tolling until discovery in conspiracy cases reflects that compromise. It was, of course, recognized by Congress that the resolution might in some cases curtail recovery by treble damage plaintiffs,* but some such curtailment is inherent in every statute

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* the Clayton Act tolls the statute of limitations with respect to private treble damage suits during the pendency of a suit by the United States to punish or restrain violations of the antitrust laws. This period of tolling is continued by the present bill with several modifications.

"There are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the Government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint. To alleviate such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings.

"While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. It believes the provisions of this bill will tend to shorten the period over which private triple damage cases will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded."

* In testifying on H. R. 3408, 82nd Cong., 1st Sess. (1951), which omitted the discovery provision contained in earlier bills, Congressman Patman stated:

"MR. PATMAN. . . . And by reason of that concealment and conspiracy these people have been destroyed, and yet they have no cause of action. It just occurs to me that there should be some way in a case like that that the parties who have been

of limitations. Where Congress has enacted a statute of limitations, it has, of necessity, proceeded on the assumption that the legitimate public policy favoring a statute of repose and limiting the litigability of stale claims outweighs countervailing interests.

The decision to upset judicially a constitutional plan which Congress labored to fashion is not consonant with a relationship between the judiciary and the legislature recognized as appropriate by this Court. This Court held only last term that when a legislative course of action has been considered and rejected by Congress "the normal expectation is that courts will be faithful to their trust and abide by that decision." *Sinclair Ref. Co.* v. *Atkinson*, 370 U. S. 195, 210 (1962). See also *Blau* v. *Lehman*, 368 U. S. 403 (1961); *ICC* v. *J-T Transp. Co.*, 368 U. S. 81, 88-89 (1961).

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so unmercifully treated should have some kind of cause of action against those who conspired against them.

"MR. WILSON. Of course, if we had an act which did not begin to run until discovery, we would have practically no statute of limitations at all. It would be just unlimited.

"MR. PATMAN. That's right.

* * * *

"MR. PATMAN. . . . I know you gentlemen have a difficult job, and I am for the bill. If you have got to have 6 years, I am for it. I would rather have the discovery provision; but, if we can't have it, then I am still for the bill." *Hearings before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary*, 82nd Cong., 1st Sess., ser. 1, pt. 3, at 100, 101 (1951).

Subsequent inconsistent statements by Congressman Patman, in colloquy with Congressman Celler on the floor of the House, suggest a disingenuous effort to supply by gloss the tolling provision which had admittedly been rejected, 101 CONG. REC. 5132-33 (1955), and stand forth as the sort of isolated and incongruous statements against reliance on which this Court has repeatedly warned. *Richards* v. *United States*, 369 U. S. 1, 10 (1962); *FTC* v. *Anheuser-Busch, Inc.*, 363 U. S. 536, 553 (1960); *Pennsylvania R. R.* v. *International Coal Mining Co.*, 230 U. S. 184 (1913).

In sum, through a misunderstanding of the opinion of this Court in *Holmberg*, the court below has been led to ignore the plain language and legislative history of Section 4B in order to achieve an onerous and unworkable result previously rejected by Congress.

Conclusion

For the foregoing reasons, this petition for certiorari should be granted.

Respectfully submitted,

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WELLINGTON M. WATTERS,
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ROBERT C. BARNARD
Moloney Electric Company, Sangamo Electric Company and Wagner Electric Corporation

ERNEST S. MEYERS,
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WILLIAM C. BLIND,
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JESSE CLIMENKO,
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March 8, 1963

APPENDIX A

Opinion of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Plaintiffs,

against

GENERAL ELECTRIC COMPANY, *et al.*,
Defendants.

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61 Civ. 4258 and Related Cases

Defendants in 418 related treble damage actions[1] brought under the Clayton Act (15 U. S. C. § 15) have moved under Rule 12 (f), Fed. R. Civ. P., to strike material from plaintiffs' complaints. Plaintiffs are public utilities, state and local governmental agencies or units and industrial corporations. Defendants include large national manufacturers of heavy electrical equipment. Comparable private treble damage suits have been instituted over the nation and roughly 1800, including those in this District, are now pending. The impetus for this massive litigation was supplied by criminal and civil injunctive proceedings brought by the United States Government against many of these defendants in 1960 in the Eastern District of Pennsylvania; the complaints before this Court were filed between November 1961 and March 1962.

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[1] Each action affects two or more defendants; 30 have been named in all. There are over 100 plaintiffs in the actions which state more than 1700 claims.

The complaints generally allege that defendants combined and conspired to fix prices and rig bids with respect to the sale of specified electrical equipment,[2] and that plaintiffs' damages are based on their purchases from defendants during a period ranging from at least the 1940's to 1960.[3] Most of the complaints also allege that defendants actively and fraudulently concealed the existence of the alleged conspiracy, and that plaintiffs neither knew of the conspiracy nor, by the exercise of reasonable diligence, could have gained knowledge of its existence until they learned of the government suits in 1960.

Three motions by defendants were brought on by notice of motion dated May 25, 1962; on successive days in June, the motions were ably argued on the basis of thorough and well-reasoned briefs. The first motion, to which this opinion is limited, is based upon the applicable four-year statute of limitations, Section 4B of the Clayton Act ("Section 4B").[4]

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[2]The general product groups affected by the alleged conspiracies are: bushings, circuit breakers, condensers, distribution transformers, hydro-electric generators, industrial control equipment, instrument transformers, insulators, isolated phase buses, lightning arresters, low voltage distribution equipment, low voltage power circuit breakers, meters, network transformers, open fuse cutouts, power capacitors, power switchboards and control equipment, power switchgear assemblies, power switching equipment, power transformers, turbine generators.

[3]The initial and terminal dates of the alleged conspiracies and the dates of alleged purchases by plaintiffs vary. In some cases the conspiracies alleged began as late as January 1956 and January 1958 so that limitations problems in these actions are absent or perhaps minimal.

[4]"Limitation of actions. Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections." 15 U. S. C. § 15b.

Defendants move to strike from the complaints all allegations of damages claimed for any period prior to the time period indicated by Section 4B and the related Section 5(b),[5] as well as allegations of fraudulent concealment of any alleged unlawful combination or conspiracy. Illustrative of allegations to which this motion is addressed are these:

> "Beginning at least as early as January 1948 and continuing thereafter until at least as late as June 1960, the defendants, co-conspirators and other persons presently unknown have engaged in a combination and conspiracy in restraint of interstate trade and commerce in turbine-generators in violation of § 1 of the Sherman Act (15 U. S. C. § 1).
>
> * * *
>
> "The defendants and co-conspirators used various devices and practices to conceal the existence of their conspiracy. . . . The defendants and co-conspirators also rigged price quotations and bids to purchasers and so represented their prices to plaintiffs as to create the semblance of competitive bidding and pricing and thereby deceived plaintiffs into thinking that they were receiving competitive prices.

[5] "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued." 15 U. S. C. § 16(b).

> By reason of these and other deliberate acts, the defendants and co-conspirators fraudulently concealed the existence of their combination and conspiracy and plaintiffs had no knowledge and could not by the exercise of reasonable diligence have obtained knowledge of the existence of the combination and conspiracy until the institution of the proceedings described in paragraph 15."[6]

The crucial question for determination is one of statutory construction; *i.e.*, is Section 4B construed to allow its four-year time period to be tolled by fraudulent concealment? In support of the proposition that it is not,[7] defendants, *inter alia*, rely on the wording of the statute, the legislative history of Section 4B, and a contention that the statute cannot be suspended on a non-statutory ground because it is substantive and not procedural in character. Plaintiffs argue principally that a doctrine of fraudulent concealment is read into every federal statute of limitations; the legislative history of Section 4B demonstrates that fraudulent concealment applies to private damage actions for antitrust violations, "artificial" formulae such as "substantive-procedural" notwithstanding, and the Court of Appeals for the Second Circuit in *Moviecolor, Ltd.* v. *East-*

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[6] 61 Civ. 4258, paras. 12, 16.

[7] "Defendants contend that all causes of action accruing more than four years prior to the date of institution of the proceedings by the United States relative to the same product and matter complained of in each complaint are barred. . . . Where no proceeding by the United States related to the same matter and product covered by a complaint, or where a defendant here was not a party to a proceeding related to such matter and product, all claims asserted therein which accrued more than four years prior to the filing of the complaint are barred." Brief for Defendants, pp. 2-3.

man Kodak Co.[8] has held that fraudulent concealment tolls Section 4B of the Clayton Act.

I am persuaded that *Moviecolor* provides the complete answer to all of defendants' contentions; therefore, I will discuss the case in some detail. Initially, I note that the parties concede that Section 4B applies to cases filed after January 7, 1956; whatever the date of accrual of the cause of action;[9] they differ only on the effect of concealment.

I.

Moviecolor was an action for treble damages under Section 4 of the Clayton Act. Plaintiff Moviecolor was a British corporation formed in 1929 and dissolved in 1939. Its action presumably accrued in 1929 or the early 1930's but was not brought until 1959.[10] Section 4B was asserted as a defense in the answers. Defendants then moved for judgment on the pleadings under Rule 12(c), Fed. R. Civ. P., claiming that the action was barred by "both the applicable state and federal statutes of limitations."

The District Court judge granted the motion. He pointed out that Section 4B had become effective on January 7, 1956, that prior to that time the federal courts looked to the statute of limitations of the states in which they

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[8]288 F. 2d 80 *cert. denied*, 368 U. S. 821 (1961) *aff'g* 1960 Trade Cas. ¶69,692 (S. D. N. Y. 1960).

[9]See *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 274 F. 2d 608 (2 Cir.) *cert. denied*, 363 U. S. 811 (1960) (4B to be given retroactive interpretation). My opinion does not deal with the question of when the various causes of action accrued.

[10]The action, brought by a "liquidator" of plaintiff corporation named in 1955, was characterized by one of the defendants as a "stale claim by a phantom plaintiff."

sat, and that Section 4B made clear that if, on its effective date, state law barred the claim, Section 4B would not revive it. Therefore, he examined the New York statute of limitations (N. Y. C. P. A. § 48(2)) to see whether the claim was barred on January 7, 1956. The District Court judge held that under New York law fraudulent concealment did not toll the New York statute of limitations. The crucial issue, therefore, was whether what he called "the federal equitable doctrine" of *Bailey* v. *Glover*, 88 U. S. (21 Wall.) 342 (1874) was available to toll the state statute. He concluded that it was not, even though the action was brought to enforce a federally created right, because the action was at law rather than in equity. It is clear from the opinion that the District Court would have reached a contrary result, on the authority of *Holmberg* v. *Armbrecht*, 327 U. S. 392 (1946), had the action been in equity.

Thereafter, plaintiff appealed. In an opinion by Judge Friendly speaking for a unanimous Court, the reasoning of the holding below was explicitly overruled. The Court stated (288 F. 2d at 83):

> "We hold that the federal rule as to the effect of concealment on the running of a period of limitation applies to an action for treble damages under the Clayton Act even when a state statute is used to measure the period. . . ."

The Court of Appeals, however, did not reverse the judgment of the District Court. It went on to consider the additional question of whether plaintiff's complaint alleged facts sufficient to bring it "within the federal concealment rule."[11] Since it concluded that the complaint did not meet that test, the judgment for defendants was affirmed.

[11] 288 F. 2d at 86.

Defendants attempt to minimize the controlling effect of *Moviecolor*. They urge that *Moviecolor* is not a holding that the fraudulent concealment doctrine applies to Section 4B but is *dictum* at best, that the decision applies only to a state statute of limitations, and is inapplicable to the main issue here.[12] They attempt to buttress this position by contending that the issue of whether Section 4B is tolled by fraudulent concealment was not fully briefed before the Court of Appeals.[13] However, analysis of *Moviecolor* compels the conclusion that the appellate court necessarily found that fraudulent concealment applies to Section 4B.

The complaint in *Moviecolor* was filed in 1959 on a claim which had aged for almost 30 years. The lower court explicitly,[14] and the Court of Appeals implicitly, recognized that Section 4B applied to the complaint before it.[15] If the doctrine of fraudulent concealment did not apply to the action in *Moviecolor* and, therefore, did not toll the four year time limit of Section 4B, then the action was clearly barred since the claim arose almost 30 years before. Only if the doctrine of fraudulent concealment *did* apply and *did* toll Section 4B was it necessary for the Court of Appeals to reach the next question: was the action already barred by state law before the effective date of Section 4B? This inquiry was required because Section 4B also states that no action already barred under state law prior to the effective

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[12]Brief for Defendants, pp. 44, 47. Consistent with that position, defendants do not argue that the actions are barred by state statute.

[13]Reply brief for Defendants, p. 36.

[14]1960 Trade Cas. at 76,727.

[15]The *Schwabe* case, *supra*, note 11, made this clear.

date of Section 4B shall be revived by Section 4B.[16] This, too, had been recognized by the Court below.[17] Therefore, to reach the ultimate issue decided in *Moviecolor*—that the federal fraudulent concealment doctrine also tolled the New York statute of limitations—the Court of Appeals first decided that fraudulent concealment was an existing federal doctrine and that it attached to Section 4B.

The Court of Appeals further decided, on policy grounds and the imputed purpose of Congress, that a uniform rule was to be preferred in the federal courts on the effect of the wrongdoer's concealment on the measuring period. This explains the significance of the word "even" in the holding already quoted above (288 F. 2d at 83):

> "the federal rule as to the effect of concealment on the running of a period of limitation applies to an action for treble damages under the Clayton Act *even* when a state statute is used to measure the period . . ." (emphasis supplied).

The Court was satisfied that the result was in accord with legislative intent. Thus, it stated (*id.* at 84):

> "It seems far more likely that Congress would have desired the federal suitor it was creating to have the benefit of the federal rule prolonging the period of suit during concealment by the wrongdoer. This is particularly so when, as under the Clayton Act, enforcement of the right often serves not merely private but public ends . . ."

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[16] "No cause of action barred under existing law on the effective date of this section . . . shall be revived . . ." 15 U. S. C. § 15(b).

[17] 1960 Trade Cas., at 76,728

It reinforced this reference to Congressional intent by the following footnote (*ibid*):

> "The debates on the 1955 amendment of the Clayton Act to provide its own period of limitation for treble damage actions, 69 Stat. 283, include statements by Representative Celler, chairman of the House Judiciary Committee, in answer to a question by Representative Patman, that under existing law the period of limitation ran only from discovery and that the new statute would not change that. 101 Cong. Rec. 5129, 5130, 5133 (1955)."

Moviecolor makes abundantly clear the view of the Court of Appeals that fraudulent concealment applies to Section 4B.[18] It is this view which defendants say is *dictum* and may, therefore, be disregarded. Whether that view is *dictum* is questionable, since I believe it was an essential element in the process of decision. But, in any event, even if it is *dictum*, its controlling effect is undiminished. Although the appeal could have been disposed of on the basis of the inadequacies of the compliant alone, the Court of Appeals made clear that it would consider broader issues and why it was doing so (288 F. 2d at 83):

> "we affirm on the ground that the complaint does not contain allegations sufficient to bring plaintiff within this federal rule. Although we could dispose of this

[18] *Cf.* 75 Harv. L. Rev. 627 (1962) which criticizes the court's failure to borrow the entire New York law on fraudulent concealment, but states (at p. 629): "That the New York legislature did not include a rule of concealment may be the reason that it made the period of limitations as long as six years; in the recently enacted federal statute that now governs limitations in Clayton Act suits, for example, the specified period is four years, *and, of course, concealment applies.*" (emphasis supplied).

> appeal solely on the latter ground, we think it proper to deal also with the important question of law decided by the District Court, since the issue has been fully argued, the decisions in the Southern District are in conflict, and the problem is likely to recur."

Therefore, it underlined the fact that its views on the subject of "the federal rule as to the effect of concealment on the running of a period of limitations" were carefully considered.[19] Moreover, the argument that *Moviecolor* should be disregarded because the question was inadequately presented to the Court of Appeals rests upon a number of questionable hypotheses. It assumes that even if this assertion were true, this Court should disregard the judgment of its senior court. It assumes that because the legislative history of Section 4B was not briefed in the Court of Appeals in *Moviecolor*, that Court's study of the legislative history was incomplete. It further assumes that because some of the cases upon which defendants rely were not discussed in the opinion of the Court of Appeals, they may not have been considered by that Court, and that consideration of these cases would lead to a different result.[20] I can-

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[19]See *General Electric Co.* v. *Hygrade Sylvania Corp.*, 61 F. Supp. 476, 525-526 (S. D. N. Y. 1944) ("judicial" and "obiter" dicta distinguished); *United States* v. *Ellis*, 264 F. 2d 325, 328 (2 Cir. 1959) ("frequently the pronouncement characterized as dictum rests upon a quite solid foundation"); *but cf. Cohens* v. *Virginia*, 19 U. S. (6 Wheat.) 264, 399 (1821); *Nolan* v. *Transocean Air Lines*, 290 F. 2d 904, 906 (2 Cir.), *cert. denied*, 368 U. S. 901 (1961).

[20]Defendants urge that the Court of Appeals would reconsider its action in the light of *United States* v. *Borin*, 209 F. 2d 145 (5 Cir. 1954) or its earlier decision in *Pollen* v. *Ford Instrument Co.*, 108 F. 2d 762 (2 Cir. 1940). But the *Pollen* case was cited by defendant Eastman Kodak both to the District Court and the Court of Appeals in *Moviecolor* (see memorandum in support of its motion in the District Court to dismiss the complaint, p. 14; brief of defendant-

not agree with these assumptions. Accordingly, on what I conceive to be the clear authority of *Moviecolor*, defendants' motion is denied.[21] On this view of the case, it is not necessary to deal with the other contentions of the parties.

II.

Under 28 U. S. C. § 1292(b), an interlocutory appeal otherwise not available may be had in a civil action if the District Judge "shall be of the opinion" that the order in question: (1) "involves a controlling question of law," (2) "as to which there is substantial ground for difference of opinion," and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."[22] Since this antitrust litigation exemplifies the type of case which in part prompted the enactment of Section 1292(b),[23] I will consider the question of whether to certify an appeal from the order to be entered on this motion.

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appellee in the Court of Appeals, p. 29). In addition, the *Borin* case was cited to the District Court (defendant Eastman Kodak memorandum *op. cit. supra* p. 18). But *cf. Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231 (1959) and *Grossman* v. *Young*, 72 F. Supp. 375 (S. D. N. Y. 1947) which plaintiff cited to the Court of Appeals in *Moviecolor*. Brief for plaintiff-appellant pp. 9, 10, 18.

[21] *Cf. Gaetzi* v. *Carling Brewing Co.*, Trade Reg. Rep. (1962 Trade Cas.) ¶ 70,339 (E. D. Mich. 1962) (doctrine of fraudulent concealment held applicable to Section 4B, but motion for summary judgment granted; doctrine held inapplicable on the undisputed facts); *Dorberg* v. *Dow Chemical Co.*, 195 F. Supp. 337 (E. D. Pa. 1961) (motion for summary judgment on the ground that Section 4B barred the claim denied, holding that complaint sufficiently alleged fraudulent concealment); a contrary holding, according to the information furnished the Court, has been made in *Brigham City Corp.* v. *General Electric Co.* (D. Utah 1962) (unreported).

[22] Section 1292(b) also provides that: "The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken. . . ."

[23] "The bill results from a growing awareness of the need for expedition of cases pending before the district courts. . . .

"There are many civil actions from which . . . illustrations could be furnished. For example, in an antitrust action a plea may be

The first and third statutory criteria stated above are clearly met. *Herman Schwabe, Inc.* v. *United Shoe Machinery Corp.*, 274 F. 2d 608 (2 Cir.) *cert. denied*, 363 U. S. 811 (1960); *Banana Distributors, Inc.* v. *United Fruit Co.*, 269 F. 2d 790 (2 Cir. 1959). As to the second, the practical problem here is whether a four year cut-off period will be applied to claims which might otherwise, in some cases, go back to the 1940's. Determination of this question affects the scope of discovery procedure, the length and complexity of ultimate trial, and the expenditure of time, money and effort which these cases will engender. These are strong reasons for having the issue of construction of Section 4B conclusively determined and determined expeditiously. Therefore, in determining whether there is "substantial ground for difference of opinion" as to the conclusive effect of *Moviecolor*, a narrow approach is not justified. While I believe *Moviecolor* decided the issue of construction of Section 4B, I also feel that there is "substantial ground for difference of opinion" as to whether it did. On the related question of whether there is substantial ground for difference of opinion on the construction of Section 4B if *Moviecolor* is not deemed to be controlling, the test is clearly met. Without exploring the parties' contentions, their extensive analysis of the legislative history of Section 4B makes clear that here is an issue which is substantial.

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entered that the claim is barred by the statute of limitations. If this motion is denied, under existing law the matter is not appealable and the case then goes forward to trial. Disposition of antitrust cases may take considerable time, yet upon appeal following final disposition of such cases, the court of appeals may well determine that the statute of limitations had run and for that reason the district court did not have jurisdiction." S. Rep. No. 2434, 85 Cong. 2d Sess., reprinted in U. S. Code Cong. & Ad. News 5255, 5256 (1958). See *Milbert* v. *Bison Laboratories, Inc.*, 260 F. 2d 431, 433 (3 Cir. 1958).

Accordingly, the order will provide that I am of the opinion that the order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that immediate appeal from the order may materially advance the ultimate termination of the litigation.

Settle order on notice.

Dated: New York, N. Y.
July 11, 1962

/s/ WILFRED FEINBERG
U. S. D. J.

APPENDIX B

APPENDIX B

Opinion Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 208—October Term, 1962

(Argued November 14, 1962 Decided December 31, 1962)

Docket No. 27884

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Plaintiffs-Appellees,

v.

GENERAL ELECTRIC COMPANY, *et al.*,
Defendants-Appellants.

Before:

LUMBARD, *Chief Judge*,
CLARK, WATERMAN, MOORE, KAUFMAN, HAYS
and MARSHALL, *Circuit Judges*.

Appeal under 28 U. S. C. § 1292(b) from an order in the United States District Court for the Southern District of New York, Wilfred Feinberg, *J.*, denying defendants' motion to strike from the complaint in an action arising under § 4 of the Clayton Act, 15 U. S. C. § 15, allegations relating to damages sustained prior to the statutory limitation period in § 4B of the Act, 15 U. S. C. § 15b, and allegations relating to the defendants' fraudulent concealment of the antitrust conspiracy.

Affirmed.

Opinion Below

MILTON HANDLER, New York, N. Y. (Kaye, Scholer, Fierman, Hays & Handler, New York, N. Y., on the brief) *for plaintiffs-appellees Atlantic City Electric Company, et al., Appalachian Power Company, et al., and Ohio Valley Electric Corporation, et al.*

EDWARD F. HUBER, New York, N. Y., NAYLON, FOSTER, DEAN & ARONSON, New York, N. Y., on the brief *for plaintiffs-appellees New York State Electric & Gas Corporation, Rochester Gas and Electric Corporation, and the Patchogue Electric Light Company.*

WEBSTER SHEFFIELD FLEISCHMANN HITCHCOCK & CHRYSTIE, New York, N. Y., on the brief *for plaintiffs-appellees Atlantic City Electric Company, et al.*

ARTHUR G. COFFEY, GERALD POWERS, RALPH WARREN SULLIVAN, ROBERT W. GELFMAN, HAROLD E. KOHN, New York, N. Y., on the brief *for plaintiff-appellee City of Boston.*

SIDNEY GOLDSTEIN, NATHANIEL FENSTERSTOCK, New York, N. Y., on the brief *for plaintiff-appellee The Port of New York Authority.*

LEO A. LARKIN, MORGAN N. LUTON, New York, N. Y., on the brief *for plaintiffs-appellees City of New York, et al.*

LE BOEUF, LAMB & LEIBY, New York, N. Y., on the brief *for plaintiffs-appellees Arkansas Power & Light Company, et al., Consolidated Edison Company of New York, Inc., Niagara Mohawk Power Corporation, Orange and Rockland Utilities, Inc.*

Opinion Below

LOUIS J. LEFKOWITZ, Attorney General of the State of New York, New York, N. Y., MATHIAS LLOYD SPIEGEL, Special Assistant Attorney General, New York, N. Y., on the brief *for plaintiffs-appellees People of the State of New York and New York State Thruway Authority.*

THOMAS F. MOORE, JR., New York, N. Y., on the brief *for plaintiff-appellee Power Authority of the State of New York.*

REID & PRIEST, COUDERT BROTHERS, New York, N. Y., on the brief *for plaintiffs-appellees Dallas Power & Light Company, et al., and Carolina Power & Light Company, et al.*

JOHN O. TESSIER, New York, N. Y., on the brief *for plaintiff-appellee Village of Freeport.*

WINTHROP, STIMSON, PUTNAM & ROBERTS, New York, N. Y., on the brief *for plaintiffs-appellees Consumers Power Company, et al.*

JOSEPH W. BURNS, New York, N. Y. (Cyrus Austin, John P. Cuddahy, Austin, Burns, Appell & Smith, New York, N. Y., on the brief), *for defendant-appellant Ingersoll-Rand Company.*

EDGAR E. BARTON, New York, N. Y. (MacDonald Flinn, New York, N. Y., White & Case, New York, N. Y., on the brief) *for defendant-appellant General Electric Company.*

HAROLD F. MCGUIRE, HARRY H. WEIL, New York, N. Y., Wickes, Riddell, Bloomer, Jacobi & McGuire, New York, N. Y., on the brief *for defendants-appellants C. H. Wheeler Manufacturing Company, The Clark Controller Company, Lapp Insulator Company, Inc., McGraw-Edison Company, Ohio Brass Company, and General Electric Company.*

Opinion Below

ALBERT R. CONNELLY, New York, N. Y. (Victor M. Earle, III, Robert S. Rifkind, New York, N. Y., Cravath, Swaine & Moore, on the brief) *for Westinghouse Electric Corporation* and Haight, Gardner Poor & Havens, on the brief *for defendant-appellant I-T-E Circuit Breaker Company.*

BROWN, WOOD, FULLER, CALDWELL & IVEY, New York, N. Y., on the brief *for defendant-appellant A. B. Chance Company.*

HUGHES, HUBBARD, BLAIR & REED, New York, N. Y., on the brief *for defendant-appellant Allen-Bradley Company.*

DAVIS POLK WARDWELL SUNDERLAND & KIENDL, New York, N. Y., on the brief *for defendants-appellants Allis-Chalmers Manufacturing Company and Carrier Corporation.*

RICHARD OWEN, New York, N. Y., on the brief *for defendant Cole Electric Products Company.*

PROSKAUER, ROSE, GOETZ & MENDELSOHN, New York, N. Y., on the brief *for defendants-appellants Cornell-Dubilier Electric Corporation and Federal Pacific Electric Company.*

KISSAM & HALPIN, New York, N. Y., on the brief *for defendant-appellant Cutler-Hammer, Inc.*

MEYER, KISSEL, MATZ & SEWARD, New York, N. Y., on the brief *for defendant-appellant Foster-Wheeler Corporation.*

ALEXANDER & GREEN, New York, N. Y., on the brief *for defendants-appellants H. K. Porter Company, Inc., Wadsworth Electric Mfg. Co., Inc. and Zinsco Electric Products Incorporated.*

Opinion Below

SATTERLEE, WARFIELD & STEPHENS, New York, N. Y., on the brief *for defendant-appellant Hubbard and Co.*

STICKLES, HAYDEN, YOUNG, KENNEDY & HORT, New York, N. Y., on the brief *for defendants-appellants Joslyn Mfg. & Supply Co., and The Porcelain Insulator Corporation.*

CASEY, LANE & MITTENDORF, New York, N. Y., on the brief *for defendant-appellant Kuhlman Electric Company.*

CLEARY, GOTTLIEB & STEEN, New York, N. Y., on the brief *for defendants-appellants Moloney Electric Company, Sangamo Electric Company and Wagner Electric Company.*

KUPFER, SILBERFELD, NATHAN & DANZIGER, New York, New York, on the brief *for defendant-appellant Norbute Corporation.*

LAPORTE & MEYERS, New York, N. Y., on the brief *for defendant-appellant Schlueger-Wood Corporation.*

CLARK, CARR & ELLIS, New York, N. Y., on the brief *for defendant-appellant Southern States, Inc.*

ALLAN D. EMIL, New York, N. Y., on the brief *for defendant-appellant Square D Company.*

CLOSE, GRIFFITHS, MCCARTHY & GAYNOR, New York, N. Y., *for defendant Ward Leonard Electric Company.*

GALLOP, CLIMENKO & GOULD, New York, N. Y., on the brief *for defendant-appellant Worthington Corporation.*

Opinion Below

LUMBARD, *Chief Judge:*

The question for decision is whether fraudulent concealment of the existence of a cause of action under § 4 of the Clayton Act, 38 Stat. 731 (1914), 15 U. S. C. § 15, tolls the running of the four-year limitation period contained in §§ 4B and 5(b) of the Act, as amended by Act of July 7, 1955, 69 Stat. 282, 15 U. S. C. §§ 15b and 16(b). We hold that it does and accordingly we affirm Judge Feinberg's order, 207 F. Supp. 613 (1962), denying motions of the defendants in 418 related actions pending in the Southern District of New York to strike from the complaints (1) allegations relating to damages sustained prior to the statutory limitation period, and (2) allegations relating to the fraudulent concealment of the conspiracies of the defendants involved in each case.[1]

Judge Feinberg, in denying the defendants' motions, certified that he was of the opinion that a controlling question of law was involved as to which there was substantial ground for difference of opinion, and that immediate appeal from his order might materially advance the ultimate termination of the litigation.[2] We granted the defendants' petition for leave to appeal, under 28 U. S. C. § 1292(b), Judges Friendly and Smith not participating.

[1] Judge Feinberg's order has been made applicable to nine additional related actions commenced after entry of the order. Pre-trial order of Chief Judge Ryan, entered on September 14, 1962 (S. D. N. Y.).

[2] Judge Feinberg decided on the basis that the decision of this court in *Moviecolor Ltd.* v. *Eastman Kodak Co.*, 288 F. 2d 80, cert. denied, 368 U. S. 821 (1961), was controlling. The opinion in that case was concerned with the applicability of the concealment doctrine to a state statute of limitation "borrowed" for the purpose of an action under the Clayton Act, see id. at 82, 83, and was decided on the ground that, although the doctrine applied, the complaint did not allege sufficient facts to give the plaintiff the benefit of it. Although Moviecolor is therefore not dispositive of the question now before us, we are in accord with the general views expressed by Judge Friendly in that opinion, as hereafter indicated.

Because of the importance of the question we ordered argument before the court sitting *in banc*. The relevant issues have been so thoroughly explored by the Court of Appeals for the Eighth Circuit[1] and by at least eight district judges[2] that we deem it unnecessary to do more than briefly summarize the reasons for our conclusion.

The intendment of the relevant decisions of the Supreme Court starting with *Bailey v. Glover*, 88 U. S. (21 Wall.) 342 (1874), is that all federal limitation statutes are subject to the doctrine of fraudulent concealment, so that if the doctrine applies "the statute does not begin to run until the fraud is discovered by, or becomes known to, the party suing. * * *" *Id.* at 350. *Exploration Co. v. United States*, 247 U. S. 435 (1918), applied this doctrine to the statute of limitations in the land patents act, ch. 559, 26 Stat. 1093 (1891), 43 U. S. C. § 1166. In *Holmberg v. Armbrecht*, 327 U. S. 392 (1946), the Supreme Court declined to "borrow" state law and applied the doctrine in a suit to enforce a federally-created equitable right arising out of § 16 of the Federal Farm Loan Act, 39 Stat. 374 (1916), 12 U. S. C. § 842, which contained no statute of limitation. Speaking

[1] *City of Kansas City, Missouri v. Federal Pacific Electric Co.*, slip sheet opinion filed November 6, 1962. Relying primarily on its analysis of the legislative history of § 43, the Court of Appeals ruled as we do here.

[2] In addition to Judge Fenberg's ruling below, three other district courts have held that fraudulent concealment tolls the statute of limitations. *Public Service Co. of Colorado v. Kan-Therm Co.*, (D. Colo., Sept. 11, 1962); *Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.* (N. D. Ill., August 28, 1962); *United States v. General Electric Co.* (E. D. Pa., Aug. 21, 1962). In two earlier cases, district courts reached the same conclusion without much discussion. *Gaetz v. Carling Brewery Co.*, 205 F. Supp. 615 (E. D. Mich. 1962); *Dozberg v. Dow Chemical Co.*, 195 F. Supp. 337 (E. D. Pa. 1961). Four district courts have held that fraudulent concealment does not toll the statute of limitations. *Kinzler v. Westinghouse Electric Corp.* (N. D. Ga., Oct. 30, 1962); *Brigham City Corp. v. General Electric Co.* (D. Utah, Sept. 28, 1962); *Kansas City v. Federal Pacific Electric Co.* (W. D. Mo., Aug. 8, 1962); *Public Service Co. of New Mexico v. General Electric Co.* (D. N. M., July 25, 1962).

for the Court, Mr. Justice Frankfurter stated: "This equitable doctrine is read into every federal statute of limitation." *Id.* at 397.

Thus the doctrine of fraudulent concealment and its application to federal statutes was well known when, starting in 1949,[5] Congress came to deal with proposals to write a limitation period into the antitrust laws in order to bring some uniformity to a field which had been left subject to the confusion of differing applicable state statutes. Section 4B, as finally enacted after six years of proposed legislation and committee hearings, reads:

> "Any action to enforce any cause of action under section 4 or 4A shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this Act shall be revived by this Act." 69 Stat. 283 (1955), 15 U. S. C. § 15b.[6]

Among the prior bills which Congress failed to enact were several which expressly provided that in conspiracy

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[5] On May 20, 1949, S. 1910, "a bill to amend the Sherman and Clayton Acts to provide a uniform period of limitations within which treble-damage actions may be instituted under the antitrust laws," was introduced in the Senate and referred to the Committee on the Judiciary. 95 Cong. Rec. 6493, 81st Cong. 1st Sess.

[6] Section 5(b), as amended in 1955, modifies § 4B as follows:

> "Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain or punish violations of any of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, that whenever the running of the statute of limitations in respect of a cause of action arising under section 4 is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued." 69 Stat. 283, 15 U. S. C. § 16(b).

cases the statute of limitations would not begin to run until the injured party discovered or had reason to discover the facts on which his claim was based;[7] there are indications in the legislative history that Congress was aware of the issue at stake.[8] But we do not believe that this background to § 4B evinces a congressional intention to enact an absolute period of limitation which would not be

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[7] S. 1910, 81st Cong. 1st Sess. (1949), would have added to section 4 of the Clayton Act the following:

> "Any action pursuant to this section may be instituted within six years after the accrual of the cause of action hereunder; or, in the case of any such cause of action based upon an alleged conspiracy in violation of the antitrust laws, within six years after the discovery by the plaintiff of the facts upon which he relies for proof of the existence of such conspiracy, if the plaintiff has exercised due diligence in seeking to discover such facts."

H. R. 7905, 81st Cong. 2d Sess. (1950), proposed amendments to section 4, including the following:

> "Any action (including an action brought by or on behalf of the United States) to enforce any cause of action under this section may be commenced within six years after the cause of action accrued or, if the cause of action is based upon a conspiracy in violation of the antitrust laws, after the plaintiff discovered (or, by the exercise of reasonable diligence, should have discovered) the facts relied upon for proof of the conspiracy; and every such action (including an action brought by or on behalf of the United States) shall be forever barred unless commenced within such six-year period."

Other bills which were introduced prior to 1955 include:

H. R. 4985, 81st Cong. 1st Sess. (1949);
H. R. 8763, 81st Cong. 2d Sess. (1950);
H. R. 3408, 82nd Cong. 1st Sess. (1951);
H. R. 1323, 82nd Cong. 1st Sess. (1951);
H. R. 1986, 82nd Cong. 1st Sess. (1951);
H. R. 467, 83rd Cong. 1st Sess. (1953).

[8] See, *e.g.*, *Hearings before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary*, 81st Cong. 2nd Sess., ser. no. 14, pt. 5, at 20-23 (1950) [on H. R. 7905]; H. R. Rep. No. 2467, 81st Cong. 2nd Sess. 4; *Hearings before the Subcommittee on Study of Monopoly Power of the House Committee on the Judiciary*, 82nd Cong. 1st Sess., ser. no. 1, pt. 3, at 100 (1951) [on H. R. 3408]; 96 Cong. Rec. 10442, 81st Cong. 2nd Sess. (1950) [exchange between Mr. Hale and Mr. Celler]; 101 Cong. Rec. 5132, 84th Cong. 1st Sess. (1955) [remarks of Mr. Patman].

subject to tolling in cases of fraudulent concealment. The failure to enact bills containing provisions that would have embodied a discovery provision in the words of the statute is hardly the kind of express negative which we think would be necessary to reverse so well established a policy of the law." As we read the Supreme Court's opinion in *Holmberg v. Armbrecht, supra*, that policy is so strong that it is applicable unless Congress expressly provides to the contrary in clear and unambiguous language.

This seems to have been the view of Congressman Celler, Chairman of the Judiciary Committee of the House, who stated in response to a question on the floor of the House that: "In the case of fraud or conspiracy the statute of limitation only runs from the time of discovery." 101 Cong. Rec. 5133, 84th Cong. 1st Sess. (1955). It seems far more likely that when Congress enacted § 4B, it intended that the doctrine of fraudulent concealment continue to apply as it had under Holmberg and its predecessors, than that it be discarded by reference to legislative history.

The appellants have strenuously urged that there are good reasons for never tolling the limitation period in antitrust actions. But it is the sole province of the Congress to weigh such factors and to determine whether well understood and long accepted doctrines are to be changed. If the Congress is disposed to make such a change it must do so by words which cannot be misunderstood.

The order of the district court is affirmed.

"It should be noted that a provision tolling the statute of limitations until the time of discovery of a violation is not the same as the doctrine of fraudulent concealment, which involves elements beyond the injured party's failure to discover that a violation has taken place. Our opinion here is, of course, confined to the effect of fraudulent concealment on the running of the statute of limitations, and does not extend to cases involving delayed discovery where there has been no fraudulent concealment.

Dissenting Opinion Below

MOORE, *C. J. (dissenting)*:

A resolution of the real conflict here is dependent upon considerations far more basic than upon any analysis or dissection of individual court decisions. In substance, the question is whether Congress has the power to enact a federal statute of limitations under which a cause of action is extinguished after a certain period of time. To say that, of course, Congress has such power but that the time limitation does not begin to run until fraud is discovered or becomes known to the aggrieved party is to beg the question. If some equitable doctrine of discovery is to be read into every federal statute of limitations then such a doctrine has assumed such quasi-Constitutional dimensions that any statute enacted by the Congress which attempts to put an end to potential litigation within the memory of man—or at least of the witnesses—might, for all practical purposes be as unconstitutional as those statutes which offend against the Constitutional amendments themselves. To be more specific, were the statute in question (Clayton Act, § 4B) to read in pertinent part, "shall be forever barred unless commenced within four years after the cause of action accrued regardless of the date of discovery of the fraud giving rise to the action and regardless of fraudulent concealment thereof", such a statute would be in direct conflict with a "fraudulent concealment" presumption.

The proponents of the "fraudulent concealment" doctrine have overwhelming arguments in their favor—mostly emotional. To reward "wrongdoers who are successful in cloaking their unlawful activities with secrecy through cunning, deceptive and clandestine practices" and then "when their machinations are discovered" to give to them "the shield of the statute of limitations to bar redress by those whom they have victimized" would appear to be

unconscionable. *City of Kansas City, Missouri* v. *Federal Pacific Electric Company*, — F. 2d — (8 Cir., Nov. 6, 1962). Another court chose to believe that "Congress did not intend that co-conspirators could spin and weave an impenetrable shroud of fraudulent concealment to cloak their illegal acts and then fraudulently render themselves immune with the shield of the statute of limitations to bar redress by those who are the victims of their conspiratorial machinations." *Commonwealth Edison Co.* v. *Allis-Chalmers Manufacturing Co.* (Civil Action No. 61C1277 *et al.*, Aug. 28, 1962, U. S. D. C. N. D. Ill.). But equally unconscionable, however, would be the case of the poor widow who, left penniless upon the death of her spouse caused by the gross negligence of some malefactor, has failed to bring in action within the prescribed statutory period.

Every statute of limitations is designed to extinguish rights lawfully acquired and in almost every case highly meritorious reasons can usually be advanced excusing the failure to bring the action within the required time—and many a hardship may result from such failure. To take literally the pronouncement that "This equitable doctrine is read into every federal statute of limitations" (*Holmberg*, 327 U. S. 392, 397), is to afford every plaintiff an opportunity to present a myriad of reasons as to why it would be unjust to apply the bar of any statute of limitations in his particular case. Yet the same Justice in the same case said, "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive." This is scarcely the kind of language designed to serve as a warning to Congress of its lack of power to enact a statute without a discovery exception. Yet balancing the equities between protection of innocent potential plaintiffs and guilty defendants, legislatures for

generations have enacted such statutes even as to fraud cases.

Therefore, unless we are willing to accept the premise that Congress has no power to enact a statute which is not subject to tolling for any reason including fraudulent concealment, the situation as it existed in 1949 (the year in which Congress apparently turned to serious consideration of a statute in the antitrust field) must be examined.

The increasing growth of federal antitrust litigation in the 1940's focused attention upon the lack of a federal statute of limitations in this field. The necessity of turning to the various state statutes to which were added the attendant problems of jurisdiction and of category of action (fraud, penalty, enforcement of a statutory right, etc.) created both confusion and uncertainty. Congress then addressed itself to the enactment of a uniform statute applicable to Clayton Act violations on a nationwide basis.

Little purpose is served by resorting to such pre-1955 doctrines as counsel and the courts claim to emanate from such cases as *Bailey* v. *Glover*, 88 U. S. 342, *Exploration Co.* v. *U. S.*, 247 U. S. 435, and *Holmberg* v. *Armbrecht*, 327 U. S. 392. The Congress frequently concerns itself with legislation to alter the effect of, or to clarify uncertainties created by, court decisions. Such a result could never be achieved if every new statute had to be interpreted in the light of the very decisions it was designed to modify or overturn.

The language of § 4B applies to "any cause of action under Section 15 or 15a * * * ". Any cause of action would embrace an action for fraud or fraudulent conspiracy. No tolling exception is provided for.[1] The statute does not

[1] "Congress in many statutes containing limitation provisions has shown its ability, where it so desired, to insert 'after discovery' clauses or to make exceptions for fraudulent conduct. 31 U. S. C. § 131; 12 U. S. C. A. § 1817(g); 15 U. S. C. A. § 78i(e); 15 U. S. C. A. § 77m, § 78i(e), § 77 ; 19 U. S. C. A. § 1621; 26 U. S. C. A. § 6501(e).

read "unless there has been fraudulent concealment" or "until discovery of the fraud". If there be ambiguity, it must be found in the words "after the cause of action accrued". Only if "accrued" is to mean "has been discovered" could the statute itself be interpreted as commencing to run from the date of discovery.[2]

Since § 4B does not contain any "fraudulent concealment" provision, the courts supporting this theory find it necessary to do judicially that which the Congress purposefully rejected legislatively. There is no doubt that from 1949 on Congressmen Patman and Celler were anxious to secure the passage of a bill which would "insure that there shall be a uniform statute of limitations applicable to all Federal courts so that the statute of limitations in treble-damage actions for anti-trust violations shall not commence to run until the plaintiff learns about the conspiracy provided the plaintiff uses due diligence." The need for such a bill arose because there was no Federal statute of limitations on treble-damage actions and because "a plaintiff [might] lose his day in court because the defendants have succeeded in concealing their conspiracy from outsiders." Hearings Before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary, 81st Cong., 2d Sess., ser. 14, pt. 5, p. 45 (1950).

Both the House bill (H. R. 4985) and the Senate bill (S. 1910) contained tolling provisions. If there had been any such principle as is now being elevated virtually to

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[2]Causes of action under the Sherman Act accrue when the inquiry caused by some overt act pursuant to the conspiracy occurs. *Unexcelled Chemical Corp. v. United States*, 345 U. S. 59, 65 (1953); *Tessier v. United States*, 269 F. 2d 305, 309, 310 (1st Cir., 1959); *Steiner v. 20th Century Fox Film Corp.*, 232 F. 2d 190 (9th Cir. 1956); *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.*, 185 F. 2d 196 (9th Cir. 1950), cert. denied, 340 U. S. 943 (1951); *Universal Film Exchange, Inc. v. Momand*, 172 F. 2d 37 (1st Cir. 1948), cert. denied, 377 U. S. 967 (1949).

constitutional dimensions there would have been no need for the vigorous advocacy in support of the tolling exception. The iniquity of permitting the wrongdoer to conceal his crime, thereby winning immunity, was featured by the bill's proponents. Others argued that the statutory period should be sufficient for the discovery of the cause of the injury.

The fate of the "discovery" provision has been adequately described in the majority opinion. In short, it was rejected by the Congress. In 1955 when the bill was finally passed, Congressman Patman recognized the need for the insertion of the words "and become known" after the word "accrued" in order "to emphasize and make clear in the law that the period of limitations shall not commence to run until at least covert wrongs have been discovered" (101 Cong. Rec. 5132 (1955)). But Congress did not accept or adopt the amendment.

Despite the assertions in the opinions supporting the "fraudulent concealment" doctrine that a search is being conducted to ascertain Congressional intent, actually the various decisions upholding the tolling doctrine rely almost entirely upon a colloquy in 1955 between Congressmen Celler and Patman. It must be remembered that these two Congressmen were in the forefront of the unsuccessful effort to have "discovery" inserted in the bills proposed during the preceding six years. There is no evidence in report, debate or otherwise of any Congressional assumption that there was to be written into every Federal statute of limitations an equitable doctrine of tolling until the fraud were discovered. However, the Eighth Circuit in its recent decision in *City of Kansas City* v. *Federal Pacific Electric* virtually founds the result reached upon this colloquy. The Court states that the colloquy "demonstrates that Congress had no intention of destroying the existing

doctrine of fraudulent concealment". To say that a colloquy of two Congressmen known to be advocates of the rejected amendment establishes the intent of Congress is an unwarranted speculation which I cannot accept. Quite apart from this case, such an approach could well have most serious consequences and would enable any two Congressmen, who chose to have a colloquy (expressing a view contrary to, or in enlargement of the language of, any bill) spread upon the Congressional Record, with the aid of such court interpretation to nullify any legislation enacted by the Congress. Here there is no evidence that the Senate ever heard the colloquy of the Congressmen. Therefore, it can scarcely be assumed that each Senator cast his vote in reliance thereon. Even in the House, there was nothing to show how many other Congressmen heard the colloquy or relied upon it in voting. If such speculation is to enter into the decision it would be far more reasonable to assume that the majority in Congress voted for the bill which did not contain the "discovery" proviso because discovery had been eliminated from the many previously rejected bills. And there is nothing to show that either House or Senate were determined not to destroy an existing doctrine of fraudulent concealment or that they were aware that there was any such doctrine.

It may well be that a "discovery" or "fraudulent concealment" amendment should be added to § 4B but the public policy and the morals issues which are involved in such legislation should be for the Congress to resolve—not the courts. Otherwise the courts in addition to their other endeavors assume a veto power over Congressional enactments whenever their views on such issues differ with those of Congress.

The courts favoring the plaintiffs' position in the many pending cases have chosen to accept the "single Congress-

man" as disclosing true Congressional intent rather than to heed the many committee reports on the subject. This approach would appear to be quite contrary to the Supreme Court decisions outlining the clues to be examined in the search for such intent, namely, committee reports and not comments from the floor. *Federal Trade Commission* v. *Anheuser-Busch, Inc.*, 363 U. S. 536 (1960); *United States* v. *International Union*, 352 U. S. 567; *Duplex Printing Press Co.* v. *Deering*, 254 U. S. 443, 475 (1921); *Pennsylvania R.R. Co.* v. *International Coal Mining Co.*, 230 U. S. 194, 198-199 (1913); *Binns* v. *United States*, 194 U. S. 486, 495 (1904).

The problem here in my opinion is quite different from estoppel (*Glus* v. *Brooklyn Eastern District Terminal*, 359 U. S. 231). It cannot be solved by the semantics of substantive-procedural debate. The many practical questions so well analyzed and posed by Judge Christensen in his thoughtful opinion in *Brigham City Coart* v. *General Electric Co.* (C16-62, C17-62, C28-62) U. S. D. C. D. Utah, Sept. 28, 1962, do not supply the answer, persuasive as they are on an *in terrorem* (at least to trial judges and trial counsel) theory. The finely spun arguments of counsel derived from their conflicting analyses of the *Bailey-Glover, Holmberg* and *Moviecolor* triumvirate merely jab at the periphery —not to the heart of the issue. That issue is whether there should be any time limitation in antitrust conspiracy actions.

As a practical matter, no well organized conspiracy will ever advise its victims of its machinations. Therefore, years and decades may elapse before discovery. Possibly it would be desirable to have no statute of limitation in this field. But discussion of this desideratum is academic. Congress has acted. It enacted a statute of limitations in the antitrust field. It rejected the proposed "discovery" amendment. Certain courts disapprove of this Congressional action. They reinsert the "discovery" clause and,

in effect, enact a court bill to take precedence over the present statute. The result is for all practical purposes no statute of limitation. That this is done under the guise of judicial prescience which can devine the true intent of the Congress does not alter the effect of the courts' actions. Now that the issue has been presented so squarely in the many decisions arising out of a common situation, it may be that Congress will endeavor to decide whether there should be a reasonable time limit in conspiracy cases or whether litigants should be permitted to go back to the time of Benjamin Franklin, who probably created all the trouble by sealing up a bolt from the blue in a little glass jar to be sold to future generations, little knowing whether pursuant to open competition or clandestine conspiracy.

In summary, I believe the solution of the public policy and public morals aspect of the situation is for the Congress and not the courts. The bill as enacted clearly does not provide for discovery. Therefore, I cannot support the conclusion of the majority who in my opinion, enact, in effect, a statute deliberately rejected by Senate and House.

APPENDIX C

Judgment Below

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the thirty-first day of December one thousand nine hundred and sixty-two.

Present:

HON. J. EDWARD LUMBARD, *Chief Judge*
HON. CHARLES E. CLARK,
HON. STERRY R. WATERMAN,
HON. LEONARD P. MOORE,
HON. IRVING R. KAUFMAN,
HON. PAUL R. HAYS,
HON. THURGOOD MARSHALL, *Circuit Judges.*

ATLANTIC CITY ELECTRIC COMPANY, *et al.*,
Plaintiffs-Appellees,

v.

GENERAL ELECTRIC COMPANY, *et al.*,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

A. DANIEL FUSARO
Clerk

APPENDIX D

Order of the District Court

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ATLANTIC CITY ELECTRIC COMPANY, et al.,

Plaintiffs.

against

GENERAL ELECTRIC COMPANY, et al.,

Defendants.

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61 Civ. 4258 and Related Cases

This Court having been moved in each of the above actions, upon Notice of Motion dated May 25, 1962, for an order, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, striking from the complaint in such action all allegations thereof (1) relating to damages (and the transactions or purchases pertaining thereto) claimed for any period prior to the time period of the statute of limitations provided in Sections 4B and 5(b) of the Clayton Act (15 U. S. C. §§ 15b and 16(b)), and (2) relating to fraudulent concealment of any alleged unlawful combination or conspiracy or acts in furtherance thereof on the ground that such allegations are immaterial, impertinent and unfairly prejudicial to defendants, and the Court having heard oral argument on June 26, 1962, and having considered the briefs filed in support of and in opposition to the motion, and due deliberation having been had, and the Court having filed its opinion dated July 11, 1962, it is hereby

Order of the District Court

ORDERED severally in each of the above actions that said motion be and the same hereby is in all respects denied.

The Court is of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion, that is to say the question

> whether all allegations (1) relating to damages (and the transactions or purchases pertaining thereto) claimed for any period prior to the time period of the statute of limitations provided in Sections 4B and 5(b) of the Clayton Act (15 U. S. C. §§ 15b and 16(b)), and (2) relating to fraudulent concealment of any alleged unlawful combination or conspiracy or acts in furtherance thereof should be stricken from the complaint in each of the above actions, pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, on the ground that such allegations are immaterial, impertinent and unfairly prejudicial to defendants because the aforesaid statute of limitations governs each of the above actions and cannot be tolled for any alleged fraudulent concealment.

and that immediate appeal from this order may materially advance the ultimate termination of this litigation.

August 1, 1962

s/d WILFRED FEINBERG
U.S.D.J.

APPENDIX E

Synopsis of Legislative History

1. S. 1910 and H. R. 4985, 81st Cong., 1st Sess. (1949):

(1) Any action may be instituted within six years after the accrual of the cause of action.

(2) In the case of any cause of action based upon an alleged conspiracy, an action may be instituted within six years after the discovery of the facts upon which the plaintiff relies for proof of the existence of such conspiracy if he has exercised due diligence.

(3) The amendments shall be applicable to any cause of action which has accrued within six years prior to the date of enactment and to any cause of action based upon an alleged conspiracy in which plaintiff in the exercise of due diligence has discovered the facts within six years prior to the date of enactment and has instituted action on or before the expiration of one year after the date of enactment.

Hearings on S. 1910 before a Subcommittee of the Senate Committee on the Judiciary, 81st Cong., 1st Sess. (1949).

2. H. R. 7905, 81st Cong., 2d Sess. (1950):

(1) Any action may be commenced within six years after the cause of action accrued.

(2) If the cause of action is based upon a conspiracy in violation of the antitrust laws, the statute is tolled until after the plaintiff discovered (or, by the exercise of reasonable diligence, should have discovered) the facts relied upon for proof of the conspiracy.

(3) Every action shall be forever barred unless commenced within the six-year period.

(4) Whenever any civil or criminal proceeding is instituted by the United States to restrain or punish violations of the antitrust laws, or to recover damages under section 4(b), the running of the statute of limitations for any private right of action based on any matter complained of in the proceeding shall be suspended during the pendency thereof.

Hearings before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary, 81st Cong., 2d Sess., ser. 14, pt. 5 (1950).

3. H. R. 8763, 81st Cong., 2d Sess. (1950):

(1) Any action shall be forever barred unless commenced within six years after the cause of action accrued.

(2) Identical to H. R. 7905, subdivision (4).

H. R. REP. No. 2467, 81st Cong., 2d Sess. (1950).
96 CONG. REC. 10437-44 (1950).

4. H. R. 1323 and H. R. 3408, 82d Cong., 1st Sess. (1951):

(1) Identical to H. R. 8763.

Hearings before the Subcommittee on the Study of Monopoly Power of the House Committee on the Judiciary, 82d Cong., 1st Sess., ser. 1, pt. 3 with supplement (1951).

5. H. R. 1986, 82d Cong., 1st Sess. (1951):

(1) Identical to S. 1910 and H. R. 4985.

6. H. R. 467, 83d Cong., 1st Sess. (1953):

(1) Identical to H. R. 8763.

7. H. R. 4954, 84th Cong., 1st Sess. (1955):

> (1) Any action shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law shall be revived.
>
> (2) Whenever any civil or criminal proceeding is instituted by the United States to restrain or punish violation of the antitrust laws, but not including an action under section 4A, the running of the statute of limitations for any private right of action based in whole or in part on any matter complained of in the proceeding shall be suspended during its pendency and for one year thereafter. But any action shall be forever barred, unless commenced either within the period of suspension or within four years after the cause of action accrued.

S. REP. No. 619, 84th Cong., 1st Sess. (1955).
H. R. REP. No. 422, 84th Cong., 1st Sess. (1955).
101 CONG. REC. 5117-40 (1955).